



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 23, 2005

Ms. Jennifer L. Carter
Maris & Lanier, P.C.
10440 North Central Expressway, Suite 1450, LB 702
Dallas, Texas 75231

OR2005-01614

Dear Ms. Carter:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 219155.

The Red Oak Police Department (the "department"), which you represent, received a request for "all documents, records, tangible thing, recording, or reproduction of any visual or auditory information" related to a former employee.¹ You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note that the submitted information contains medical records, access to which is governed by the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of chapter 552 of the Government Code. See Open Records Decision No. 598 (1991). Section 159.002 of the MPA provides the following:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is

¹We note that tangible items are not subject to disclosure under chapter 552 of the Government Code. See Gov't Code § 552.002; Open Records Decision No. 581 (1990).

confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(a)-(c). This office has also concluded that when a file is created as the result of a hospital stay, all of the documents in the file that relate to diagnosis and treatment constitute either physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. *See Open Records Decision No. 546 (1990)*. Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. *Open Records Decision No. 565 at 7 (1990)*. Medical records may be released only as provided under the MPA. *Open Records Decision No. 598 (1991)*. We have marked the information that is subject to the MPA and may be released only if the MPA permits the department to do so.

We also note that the submitted information includes EMS records. Section 773.091 of the Health and Safety Code provides in part:

(b) Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

....

(g) The privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services. . . .

Health & Safety Code § 773.091(b), (g). Thus, except for the information specified in section 773.091(g), EMS records are deemed confidential under section 773.091 and, therefore, may only be released in accordance with chapter 773 of the Health and Safety Code. *See* Health & Safety Code §§ 773.091-.094. We note, however, that records that are confidential under section 773.091 may be disclosed to “any person who bears a written consent of the patient or other persons authorized to act on the patient's behalf for the release of confidential information.” Health & Safety Code §§ 773.092(e)(4), .093. Section 773.093 provides that a consent for release of EMS records must specify: (1) the information or records to be covered by the release; (2) the reasons or purpose for the release; and (3) the person to whom the information is to be released. We have marked the EMS records that are subject to chapter 773 of the Health and Safety Code. If section 773.092 applies in this instance, the department must release these marked EMS records to the requestor. *See* Health & Safety Code §§ 773.092, .093; *see also* Open Records Decision No. 632 (1995). Otherwise, the department must withhold these marked EMS records pursuant to section 773.091(b) of the Health and Safety Code, except for the information in these records that is not confidential under section 773.091(g).

The submitted records also contain fingerprint information. Chapter 560 of the Government Code provides that a governmental body may not release fingerprint information except in certain limited circumstances. *See* Gov't Code §§ 560.001 (defining “biometric identifier” to include fingerprints), .002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), .003 (providing that biometric identifiers in possession of governmental body are exempt from disclosure under Act). These sections protect the privacy of the individual to whom a fingerprint or other biometric identifier pertains. *See id.* § 560.002(1)(a). Therefore, the requestor has a right of access to his client's fingerprint information under section 560.002, and that information must be released to him.

We note that some of the submitted documents are subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part the following:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

- (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

Gov't Code §552.022(a)(1), (3). The submitted documents include completed reports and evaluations made of, for, or by the department, as well as information in vouchers relating to the expenditure of public funds by the department. The completed reports and evaluations are expressly public under section 552.022(a)(1) unless excepted under section 552.108 of the Government Code or confidential under other law. The vouchers are expressly public under section 552.022(a)(3) unless confidential under other law.

Section 552.108 is not claimed in this instance. Instead, you claim the submitted information may be withheld under section 552.103 of the Government Code. Section 552.103 is a discretionary exception to disclosure under the Act that protects the governmental body's interests and may be waived.² As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022(a).

However, we note that the vouchers contain account numbers. Section 552.136 of the Government Code is other law for purposes of section 552.022 and provides in relevant part:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

² Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. See, e.g., *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103), Open Records Decision Nos. 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

Gov't Code § 552.136. The department must therefore withhold the account numbers under section 552.136. The remaining information that is subject to section 552.022 must be released to this requestor.³

We now turn to the exception that you claim for the remaining information, which is not subject to section 552.022. Section 552.103 of the Government Code provides in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

³We note that the records to be released contain information relating to the requestor that would be excepted from disclosure to the general public under laws and exceptions designed to protect privacy. However, as the attorney for the subject of this information, the requestor has a special right of access to it. See Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates, or that person's representative, solely on grounds that information is considered confidential by privacy principles). If the department receives another request for this information from someone other than the requestor, the department should again seek our decision.

You indicate and provide documentation showing that, prior to the department's receipt of this request, the requestor filed a complaint with the Equal Employment Opportunity Commission ("EEOC") alleging discrimination and the complaint remained pending on the date the department received this request. Based on the information you have provided, we conclude that you have shown that litigation was reasonably anticipated when the department received this request. *See, e.g.*, Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982) (pending EEOC complaint indicates litigation is reasonably anticipated). In addition, based on your representations and our review of the remaining submitted information, we agree that this information is related to the anticipated litigation for purposes of section 552.103(a). Thus, you have demonstrated the applicability of section 552.103. We therefore conclude that the department may generally withhold the remaining submitted information pursuant to section 552.103.

We note, however, that once information has been obtained by all parties to the litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). Some of the submitted documents reflect on their face that they were obtained from or provided to the requestor's client, who is apparently the only opposing party in the anticipated litigation. Therefore, to the extent the requestor's client has had access to the submitted information, it may not be withheld under section 552.103. We also note that the applicability of section 552.103(a) ends when the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

We note, however, that some of the information that the requestor's client might previously have had access to is confidential by law. Section 6103(a) of title 26 of the United States Code makes federal tax return information confidential. *See* 26 U.S.C. § 6103(a); *See also* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *dismissed in part, aff'd in part, vacated in part, and remanded*, 993 F.2d 1111 (4th Cir. 1993). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of income, payments, tax withheld, deficiencies, overassessments or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return . . . or the determination of the existence, or possible existence, of liability . . . for any tax, . . . penalty, . . . , or offense[.]" *See* 26 U.S.C. § 6103(b)(2)(A) (emphasis added). Even if the requestor's client has previously had access to the submitted tax return information, the department must withhold such information

under section 552.101 in conjunction with section 6103 of title 26 of the United States Code. The remaining information to which the requestor's client has had access must be released.⁴

In summary, medical records may only be released in accordance with the MPA. The marked EMS records must be withheld under section 773.091 of the Health and Safety Code unless the department receives a valid consent under section 773.092 for their release. The requestor has a special right of access to his client's fingerprint information under section 560.002 of the Government Code, and this information must be released to him. Other than account numbers that must be withheld under section 552.136 of the Government Code, completed reports, evaluations, and vouchers must be released under section 552.022 of the Government Code. The remaining submitted information may be withheld under section 552.103 of the Government Code unless it has been obtained from or provided to the potential opposing party in the pending litigation. The submitted tax return information is confidential under section 6103 of title 26 of the United States Code and must be withheld under section 552.101 of the Government Code even if the requestor's client has previously had access to it.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll

⁴We note, however, that if the department receives another request for information from a different requestor, the department should again seek a decision from us before releasing this information to such a requestor. See Gov't Code §§ 552.301, .302; Open Records Decision No. 673 (2001).

free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



L. Joseph James
Assistant Attorney General
Open Records Division

LJJ/seg

Ref: ID# 219155

Enc. Submitted documents

c: Mr. Michael W. Dickey
P.O. Box 1171
Red Oak, Texas 75154-1171
(w/o enclosures)